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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-659

JOHN CAPRA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 501 F.2d 267. The opinions of the district court with respect to its suppression and pretrial publicity rulings (Pet. Apps. B, C, and E) are reported at 372 F.Supp. 600, 603 and 609; the district court's wire interception ruling (Pet. App. F) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1974, and a petition for rehearing was denied on September 27, 1974. By order dated October 18, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including November 26, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' convictions for substantive narcotics violations should be reversed because of the introduction of evidence derived from wire interceptions, part of which were held by the court of appeals to be unlawful, where the interceptions took place after the commission of the substantive offenses and the evidence derived from the interceptions related only to the conspiracy charge, which was reversed by the court of appeals.

2. Whether the court properly instructed the jury regarding the consideration of hearsay declarations of co-conspirators.

3. Whether petitioners have standing to challenge the search and seizure of a suitcase containing 5½ kilograms of heroin and 1 kilogram of cocaine that took place after they had sold the narcotics and relinquished control over them.

4. Whether publicity occurring at the time of petitioners' arrest warranted dismissal of the charges against them.

5. Whether the warrantless search of an automobile was justified on the facts of this case.

6. Whether petitioners were denied a fair trial by four instances of allegedly improper questioning by the prosecution.

STATEMENT

After a five-week jury trial in the United States District Court for the Southern District of New York, petitioners and co-defendant Robert Jermain were convicted of selling 3 kilograms of heroin, in violation of 26 U.S.C. (1964 ed.) 4705(a) and 7237 (b), and of distributing, and possessing with the intent to distribute, 5½ kilograms of heroin and 1 kilogram of cocaine, in violation of 21 U.S.C. 812, 841 (a)(1), and 841(b)(1)(A). Petitioners and co-defendants Jermain, George Harris, and Alan Morris were also convicted of conspiracy to violate federal narcotics laws, in violation of 18 U.S.C. 371. Petitioners were each sentenced to concurrent 15 year terms of imprisonment and to six years' special parole on the conspiracy and various substantive counts. Petitioners Capra and Guarino were sentenced in addition to a consecutive term of three years' imprisonment and six years' special parole, and to fines totalling $45,000 (Tr. Vol. 9, 75-76). After noting that some of the evidence admitted at trial to prove petitioners' participation in the conspiracy should have been suppressed, the court of appeals affirmed petitioners' convictions on the sub-

stantive counts and reversed their conspiracy convictions.[1]

The evidence, which is no longer in dispute, is detailed in the opinion of the court of appeals. It shows that petitioners formed an enterprise centered in New York for the massive marketing of heroin and cocaine, in which their functions were loosely but generally divided: Guarino secured drugs from importers, Capra acted as distributor, and DellaCava made deliveries. Later Joaquin Ramos, an admitted co-conspirator but not a defendant in this case, and co-defendant Jermain transferred drugs from DellaCava in New York to co-defendants Alan Morris and George Harris for sale in the midwest.

After Ramos's release from federal prison in 1969, he frequented the Havermeyer Social Club in the Bronx, at petitioners' invitation. The club was one of petitioners' fronts for the enterprise. Guarino offered to reestablish Ramos in the narcotics business, and during the period when Ramos was considering the proposition, he helped count and hide money which DellaCava brought into the club (Tr. 148-152). By the fall of 1969, Ramos and a partner were distributing a kilo of heroin each month.

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[1] The basis of the reversal of the conspiracy conviction (Pet. App. A23) was that some of the evidence admitted at trial to prove the conspiracy had been obtained by court-authorized wire interceptions, part of which the court of appeals held to be unlawful. The sentences of imprisonment that petitioners had received on the conspiracy charges were to run concurrently with those received on the substantive charges. The net result of the reversal was thus that Capra's and Guarino's fines were each reduced by $25,000.

Ramos's usual routine was to place orders with Guarino or Capra at the club and leave a car there, with a full tank of gasoline, so that DellaCava could use it to get the narcotics, and, after driving around New York City to insure that he was not being watched, return, leaving the narcotics in the trunk of the car for distribution by Ramos (Tr. 152-160).

Jermain, whose major customer was Harris, a Detroit drug dealer, entered into a partnership with Ramos in March 1970. On instructions from Capra, they developed a pattern of dealing in which Harris paid in advance of delivery, and Ramos or Jermain delivered the drugs to him or one of his agents (Tr. 185-188, 252-254, 267). In 1970, Ramos and Jermain established an additional outlet with another midwestern dealer, Alan Morris. In August 1970, Ramos delivered two kilograms of heroin to Morris in New York City. Morris had prepaid Ramos $48,000 for the heroin (Tr. 286-291).[2]

In early November 1970, Harris asked Ramos and Jermain to get him a kilogram of heroin. After Ramos discussed the matter with DellaCava, Jermain agreed to take care of the delivery of the heroin (Tr. 259-262). The following evening, Jermain gave two packages containing heroin to Harris and his associate, Earl Simms, who testified as a witness for the government (Tr. 1336-1339, 1566-1567). Ramos subsequently paid $24,000 to Capra and Guarino for

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[2] This sale was the subject of Count 2 of the indictment.

the heroin Jermain had delivered to Harris (Tr. 264).[3]

By 1971, Morris was placing orders every three or four months for approximately $150,000 worth of heroin (Tr. 278-286, 299-302). As their business expanded, Ramos and Jermain not only demanded payment in advance from Morris, but also refused to meet with him in New York City (Tr. 355-359, 370-376). Instead, Ramos or Jermain checked the packages of narcotics in public terminals and then forwarded the claim checks to Morris, who picked up the drugs without ever meeting the distributors face-to-face (Tr. 433-434, 443-444). One such sale—of five and one-half kilograms of heroin and one kilogram of cocaine, consummated in October 1971 at the Toledo, Ohio train station—led to the arrest of Ramos.[4]

The growth of the enterprise, as outlined by Ramos and corroborating witnesses (Tr. 1330-1334, 1336-1339, 1566-1567), was further described by narcotics agents who had overheard conversations relating to the conspiracy while engaged in electronic surveillance that had initially been directed at one Joseph DellaValle, the owner of the tavern out of which DellaCava operated. This surveillance commenced nearly two months after the completion of the last transaction charged in the substantive counts.

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[3] This sale was the subject of Count 3 of the indictment.

[4] This sale was the subject of Counts 4 and 5 of the indictment.

ARGUMENT

1. The court of appeals held that "none of the evidence resulting from the illegal wiretaps was used to prove the guilt of [petitioners] on the substantive charges" (Pet. App. A23-A24), the last of which was committed about two months before the interceptions commenced. Accordingly, while it suppressed certain of this wire interception evidence and reversed the conspiracy conviction to which the evidence related, the court below affirmed the substantive convictions. This ruling was correct and petitioners' contentions relating to the wire interception evidence have no substance.

a. Petitioners assert that their connection with witness Ramos was first discovered in October 1972 as a result of a chain of events traceable to electronic surveillance undertaken ten months earlier, which the court of appeals held to have been unlawful. Therefore, they submit that all of Ramos's testimony at trial should be suppressed as "fruit of the poisonous tree."

We rely on the finding of the court below, which is supported by the testimony at trial, that "[t]here is no indication in the record nor was there a claim by any of the defendants that the police identified Ramos or asked him to testify as a result of evidence uncovered by the wiretaps" (Pet. App. A24).[5]

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[5] Petitioners argue that the court of appeals erred in concluding that they did not claim that the identification of Ramos resulted from an illegal interception, pointing to counsel's statement at trial that "My chief concern * * * is

Undisputed testimony about police visual surveillance of witness Ramos, which took place before any of the telephone monitoring, shows that on November 5, 1970, Ramos was followed from a restaurant to the Havermeyer Social Club, which petitioner DellaCava entered shortly thereafter. Approximately half an hour later, Ramos and DellaCava were observed leaving the club together (Tr. 1330-1334). On December 2, 1970, Ramos made two trips to the Havermeyer Social Club, where he spent most of the evening. During his stay there, at approximately 9:00 p.m., co-defendant Jermain entered the club; at approximately 10:00 p.m., petitioner DellaCava drove up in a green Ford and entered the club (Tr. 1041, 1111-1112). On December 7, 1970, co-defendant Jermain was observed meeting Ramos and driving him to the Havermeyer Social Club. After a brief period of time in the club, both men went to a restaurant

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that the witness Ramos was discovered as a result of some illegality or some illegality may have been exercised with regard to witness Ramos." (Pet. 89). But this bare suggestion that there might be "some illegality" which led to the discovery of Ramos is far from a specific claim that the interception led to his identification. Even now, petitioners base their claim simply on the assertion that, since Ramos agreed to cooperate with this investigation one month after references to his part in the conspiracy were overheard, there is a "reasonable inference" that the monitoring led to the identification and agreement to testify (Pet. 85). As we note, *infra*, however, the record clearly establishes police awareness of Ramos's connection with petitioners before the interception and provides no basis for the speculation that his agreement to cooperate was motivated by the interception, rather than by the conclusion of related state proceedings against him, or, indeed, by any other motivation.

where they parked directly across the street from the green Ford that DellaCava had been driving on December 2, 1970 (Tr. 1041, 1113). Approximately forty-five minutes later, Jermain left the restaurant and picked up co-defendant Morris. A few minutes later, DellaCava left the restaurant with five people (Tr. 1041-1042). There was also testimony that, during the first quarter of 1971, Capra was observed on approximately six occasions driving a car that was being watched in connection with the investigation of Ramos and Jermain (Tr. 2964, 2992-2996).

From this testimony it is clear that the police had identified petitioners and were aware of their connection with Ramos before the monitoring of DellaValle started.[6] Therefore, petitioners' unsupported assertion that Ramos's testimony is a fruit of the suppressed wire interceptions is erroneous.[7]

b. Petitioners assert that the wire interception evidence, part of which was suppressed by the court below (Pet. App. A8-A16), was "the real corroborative evidence of Ramos' testimony concerning petitioners' roles as suppliers" (Pet. 81). Therefore, they contend that its introduction at trial requires a new trial or re-sentencing.

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[6] Petitioners were not known to be associates of DellaValle. This explains what petitioners call the government's concession (Pet. 17 n. 10) that the identities of petitioners were not known to the police when the first wire interception order was issued on December 8, 1971.

[7] In this factual setting, there is no reason to reach the question whether the testimony of a live witness acting through his individual volition and choice should ever be considered tainted as the fruit of an improper interception.

The court below correctly concluded, however, that the record shows that Ramos's testimony was independently corroborated (Pet. App. A24). It was corroborated in detail by police visual and photographic surveillance evidence (*e.g.*, G. Exs. 22, 24) by airline, hotel and telephone toll records (*e.g.*, G Exs. 26, 39, 42, 44, 46, 47, 76, 77, and 134A), and by the testimony of co-conspirators Earl Simms and Joseph Conforti.

Although the prosecution's theory was that petitioners, as suppliers, were careful to hire others to take the risks associated with the actual handling of the narcotics, first hand evidence, other than the monitored telephone conversations, reveals their personal involvement. Ramos testified that DellaCava's job was to retrieve the narcotics from their hiding place for each sale (Tr. 158, 741), and that Capra and Guarino handled the finances, setting the prices to be paid and dividing the profits (Tr. 149, 151).

DellaCava's direct contact with the heroin was corroborated by the traces of heroin and the machine for sealing plastic bags found in his car. Capra's involvement in the financial end of the business was corroborated by the itemized bill for the Toledo, Ohio sale of five and one-half kilos of heroin and one kilo of cocaine (G. Ex. 21), which other evidence showed was in his handwriting (G. Ex. 135). Ramos's testimony about Capra's personal involvement was also corroborated by Conforti's testimony that he heard Capra tell co-conspirator Caruso to give Conforti materials to dilute or "cut" heroin (Tr. 2420-2424).

Conforti also testified that he heard Guarino tell co-conspirator Sperling that "we need the money to get this deal going," just before Sperling sent Conforti to pick up $30,000 (Tr. 2428). He further testified that on another occasion when he was summoned to Sperling's house with cutting materials, Conforti heard Guarino tell Sperling, "Things are looking up, we're going to have a good year" and that a "connection" had been made (Tr. 2445).[8]

Thus, the wire interception evidence only corroborated a wealth of other evidence establishing petitioners' guilt on the substantive counts, and any error in admitting this evidence was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18.

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[8] Even though petitioners' conspiracy convictions were reversed, co-conspirator declarations were nevertheless admissible and properly admitted on the substantive counts. It is well settled that, regardless of whether a conspiracy is charged in the indictment, acts and statements of co-conspirators made in furtherance of the conspiracy are admissible at trial against other co-conspirators. *Anderson* v. *United States*, 417 U.S. 211, 218; *United States* v. *Annunziato*, 293 F.2d 373, 378 (C.A. 2), certiorari denied, 368 U.S. 919; *United States* v. *Olweiss*, 138 F.2d 798, 800 (C.A. 2), certiorari denied, 321 U.S. 744. Here, the evidence showed that petitioners did not personally handle the delivery of narcotics to customers but acted through intermediaries. Therefore, evidence of their participation in the substantive counts was necessarily circumstantial, and evidence of prior and subsequent transactions by petitioners which showed the continuing nature of their joint venture was particularly appropriate to prove knowledge, intent, and modus operandi. *Lisenba* v. *California*, 314 U.S. 219, 227; *United States* v. *Turner*, 423 F.2d 481, 483-484 (C.A. 7), certiorari denied, 398 U.S. 967.

2. Petitioners contend that the trial court improperly instructed the jury regarding its consideration of hearsay evidence (Pet. 143-150).

In its charge, the district court instructed the jury that each defendant's participation in the conspiracy must be established by evidence as to his own words, actions, or conduct and that the jury had to find that a defendant was a member of the conspiracy by a preponderance of non-hearsay evidence before it could consider hearsay evidence against him in determining his guilt beyond a reasonable doubt (Tr. 3941-3942).[9]

Petitioners, who do not contend that the non-hearsay evidence was insufficient to permit the introduction of acts and statements of co-conspirators, argue that the judge erred in not giving these instructions at the time the hearsay evidence was first admitted and throughout the trial, rather than just prior to the jury deliberations. In support of this contention, petitioners point to language in *Lutwak* v. *United States*, 344 U.S. 604, 618-619, concerning a declaration made after the conspiracy had ended:

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[9] Petitioners claim that this instruction permitted the jury to apply a preponderance test to determine guilt or innocence on the conspiracy charge (Pet. 147). The court of appeals' reversal of the conspiracy convictions cured any such error in the instruction. In any event, we note that on at least three occasions the jury was instructed that membership in the conspiracy must be established beyond a reasonable doubt in order for them to convict on the conspiracy count (Tr. 3938, 3941-3942, 4081). Moreover, on five other occasions the jury was instructed on the reasonable doubt standard with respect to the charges in general and the particular elements of the various counts (Tr. 3903, 3905, 3917, 3923, 3932).

> In the trial of a criminal case for conspiracy, it is inevitable that there shall be * * * evidence as to declarations that is admissible as against all of the alleged conspirators; there are also other declarations admissible only as to the declarant and those present who by their silence or other conduct assent to the truth of the declaration. These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them * * * [*i.e.*] to whom they have been restricted and in some instances for what specific purpose.

The Court in *Lutwak* was concerned that declarations made after the conspiracy had ended, "admissible only as to the declarant and those present who * * * assent to the truth of the declaration," be accompanied by an instruction at the time of their admission into evidence appropriately limiting the jury's consideration of that evidence. Contrary to petitioners' suggestion, the Court did not hold that declarations and acts like those in the instant case, made in furtherance of the conspiracy and admissible against all of the conspirators whose participation in the conspiracy was established, need be accompanied by such an instruction. In these circumstances, such an instruction would be both confusing and incorrect.[10]

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[10] Similarly, *United States* v. *Apollo*, 476 F.2d 156 (C.A. 5), cited by petitioners (Pet. 144), is inapposite. There, the extrajudicial statements of alleged co-conspirators linking

3. Petitioners contend that the narcotics seized from a suitcase Ramos checked at the baggage room of the Toledo, Ohio railroad station should have been suppressed as the result of an illegal search and seizure. The court of appeals and the district court properly rejected this claim, in opinions upon which we rely (Pet. App. A5-A8, E1-E10).

The evidence at the suppression hearing and the trial showed that after Morris paid Ramos $150,000 for a narcotics delivery,[11] Ramos checked a suitcase containing the narcotics at the baggage room and mailed the claim check to Morris. The baggage attendants' suspicions were aroused by Ramos's manner[12] and by the weight and rustling sound of the suitcase. When the suitcase was not promptly retrieved, the attendants consulted with a railroad police agent, Blevins, who was employed by the railroad to protect railroad property. They told him they feared the bag might contain a bomb, and the three men decided to open the suitcase to make sure it was

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the defendant with a conspiracy were made at a time when the conspiracy and the defendant's connection with it were not firmly established. The court held that it was error to tell the jury that "connection with conspiracy must of necessity be established by some hearsay in this kind of case", and that instead limiting instructions should have been given (*id.* at 163).

[11] This was petitioners' share of the proceeds. Jermain and Ramos were to split the balance due (Pet. App. A7-A8).

[12] He was "nervous and tense" and "aggressively" rejected the agent's suggestion that he use a coin locker, which would have been more usual, since he intended to leave the suitcase for more than a few hours (Pet. App. E3-E4).

safe (Pet. App. E4). When the baggage attendants and Blevins were unable to open the suitcase, Blevins called a city police detective, Ryan, reported his concern, and asked for assistance in opening the suitcase. Ryan and two other policemen came to the station and picked the locks on the suitcase. One of the baggage agents then opened it and discovered the narcotics. Morris was arrested with an accomplice in the station after the accomplice claimed the bag and delivered it to Morris (Pet. App. E5).

After consideration of this evidence, the courts below concluded that petitioners here had no standing to challenge the search and seizure (Pet. App. E2-E3, A7-A8). They had been fully paid for the narcotics and had completed their part in the plan for its delivery, and thus they no longer had a sufficient possessory interest in the suitcase or its contents upon which to base their claim. See *Brown* v. *United States*, 411 U.S. 223, 228-230. In any event, both courts noted that the search was essentially a private one by the railroad employees in the proper exercise of their responsibility to protect the railroad's property, not a search for evidence of a crime by law enforcement officials (Pet. App. E6-E7, A25).

There is no need for further review of the concurrent holdings of both courts below, which turn on the particular facts of this case, and thus present no issues of continuing importance.

4. Petitioners contend that this Court should dismiss all charges against petitioners because of publicity at the time of their arrest. We rely for re-

sponse to this contention on the opinion of the court below. As the court stated (Pet. App. A19):

> The trial court correctly held that there was no showing of prejudice in this case. Absent proof of bias on the part of individual members of a jury, reversal, because of extensive publicity adverse to the accused, is required where, after reading or hearing it, a resulting conclusion of guilt in the minds of the general public would be practically certain, *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), or where improper pressure on a jury was clear from the record itself, *Estes* v. *Texas*, 381 U.S. 532 (1965), neither of which the trial court found here.

5. Petitioners contend that the warrantless search of petitioner DellaCava's car when he was arrested following his indictment—and the subsequent vacuuming of a bag containing almost $14,000 in cash found in the car—were improper, and thus that the evidence obtained thereby should have been suppressed.[13]

The court of appeals concluded that the agents had probable cause to believe that the car was being used to transport narcotics, based on their prior knowledge of DellaCava's activities and of the charges in the indictment under which he was arrested (Pet.

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[13] Only petitioner DellaCava has standing to raise this issue. *Alderman* v. *United States*, 394 U.S. 165. The car search revealed a machine for sealing plastic bags, as well as the bag full of money. The vacuuming disclosed traces of heroin (Pet. App. A21).

App. A21). A warrantless search of an automobile, either immediate or delayed, based on probable cause to believe that it contains contraband or evidence of a crime does not violate the Fourth Amendment, *Carroll* v. *United States*, 267 U.S. 132; *Chambers* v. *Maroney*, 399 U.S. 42.[14] The search of the bag found in the car was similarly proper. *United States* v. *Soriano*, 497 F.2d 147 (C.A. 5). Although petitioners challenge the court's finding that, under the particular circumstances here, the officers had probable cause to search the car, there is no need for further review of this narrow and essentially factual issue. In any event, in light of the other overwhelming evidence of guilt, any error was clearly harmless.

6. Petitioners contend (Pet. 150-153) that they were denied a fair trial by four instances of allegedly improper questioning by the prosecutor. On their face, the questions, which appear at Pet. 150-151, can hardly be considered inflammatory. Moreover, the court sustained objections to three of the questions, and, as petitioners note (Pet. 151), the judge instructed the jury that "a question is not evidence." The fourth instance of allegedly improper questioning related to the sale of heroin to co-defendant Morris in brown paper bags (Tr. 987). After Ramos

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[14] Since the officers had probable cause to search the car, it is not necessary to conclude further, as did the courts below, that the search was justified in anticipation of the forfeiture of the car.

The fact that part of that search occurred some time later is not significant. *Chambers* v. *Maroney, supra; United States* v. *Edwards*, 415 U.S. 800, 806-809.

testified about the price paid for the bags, he was asked whether he ever had any conversation with DellaCava, Guarino, or Capra about what the bags contained. Ramos answered that conversations regarding the bags related to heroin. After objection by defense counsel, the time frame for these discussions was limited to that charged in the indictment (Tr. 988-989). As noted above, such testimony was properly introduced as petitioners' admissions that they knew Ramos was selling heroin to Morris.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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